Supreme Court, U.S.
FILED

No. 98 937 DEC 8 1998

OFFICE OF THE CLERK

**In The**

**Supreme Court Of The United States**

**October Term, 1998**

MARY VAN / DALE HARRIS,
*Petitioner*

vs.

United States Of America et, al.
*Respondent(s)*

**On Petition For A Writ Of Certiorari To Ninth Circuit Court**

# PETITION FOR WRIT OF CERTIORARI

Mary Van
Dale Harris
2412 W. 32nd St.
Ada, Oklahoma 74820
1-580-332-4337

50 pp

## QUESTIONS PRESENTED

1. Were the ninth circuit court decisions correct in affirming district courts decision on summary judgment on discrimination / FTCA when Plaintiffs voluntarily dismissed this suit against government and from Court files and no Court having jurisdiction?

2. Whether there was an abuse or descretion by ninth circuit court declining to address Harris Children, Gun Threat, Sexual Abuse, subject of Civil Rights Suit?

3. Whether Ninth Circuit Court erred in affirming Arizona District Court decision based on private individuals protection by Government when suit consist of Government Employee Actors only?

4. Whether Ninth Circuit Court erred in rule for District Court for Appellants failure to comply with District Court Order for Second Complaint?

5. Whether the District Court correctly dismissed Plaintiffs Pleading and Evidence with subject matter of Sexual Abuse, Gun Threat on Life, Harris Children?

6. Whether Oklahoma District Court correctly ordered Transferring Venue?

7. Whether Oklahoma District Court erred when they refused to file our petition on Transferring Venue to Tenth Circuit Court and mailed petition to Arizona District Court?

## LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

United States of America – Respondents
U.S. General Attorney
Department of the Interior
Bruce Babbitt, Secretary
Charles Johnson, Superintendent of Education, B.I.A.
Michael Schoenfeld, Principal, B.I.A.
Duke Stephenson, Department Head, B.I.A.
Cathy Begay, Principal, B.I.A.
William Mehojah, B.I.A.
Donal Neconie, B.I.A.

## TABLE OF AUTHORITIES CITED

### Statutes and Rules

Fourteenth Amendment to United States Constitution

Section 1983, Title 42 U.S.C.436 U.S. 658 (1978)

Statute 9208

Statute 92.06

18 USCA Statute 871

Federal Statute, 41 U.S.C. 1983

18 U.S.C. 4

Joiner 19 (a) and Joiner 20

6th Amendment

### Other

44 BIAM; 62 BIAM 11.25 (A)

PL 135

Federal Personnel Manual Article – Safety

Federal Personnel Manual Article VII (f)(g)

Indian News Vol 14- pp 5 - Mr. Bruce Babbitt Policy

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G. Late Filing

H. Order Dismiss Torts Claim
March 9, 1995

I. 44 BIAM

## CITATIONS TO UNOFFICIAL JUDGMENTS, ORDERS AND OPINIONS

The Arizona District Court by the Honorable Rosenblatt, Judge rendered its final judgment for Defendants on Summary Judgment in case number CIV 95–048 PHX PGR on 9th of January, 1996. The Ninth Circuit Court of Appeals filed its unpublished decision Case number 97–15660 on 17th of September 1998. The Ninth Circuit Court denied Petitioner's for review on 15th of October, 1998. All of the above appears in the appendix hereto.

———— ♦ ————

## BASIS FOR JURISDICTION OF THIS COURT

The Ninth Circuit Court had no jurisdiction over Summary Judgment. This suit, Discrimination / FTCA against Government was voluntarily dismissed by Plaintiffs, rendering it non-existing in court files and no court having jurisdiction.

The 14th Amendment rights which the Court has jurisdiction under 28 U.S.C. over the Civil Rights Case which they declined to address.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date:
October 15, 1998, and a copy of the order denying rehearing appears in the Appendix.

———— ♦ ————

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Fourteenth Amendment of the Constitution of the United States provide that no state shall deprive any person of Life, Liberty, or Property without due process of Law. In this suit Plaintiffs jobs as teachers is a property interest which is protected by due process of law.

2. Title 42, U.S.C. Section 1983 which provides in pertinent part that:
"Every person who, under color of any statue, 2

> ordinance, regulations, customs, or usage of any state or territory, subjects or causes to be subject ed,any Citizen of the United States or other per sons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution any laws, shall be liable to the party injured in an actionat law for redress."

The "Privileges and Immunities" protected by this section included those secured by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

The forbidden action must be one taken "Under Color of State Law."

3. Statue 9208 "Under Color of State Law". Acts are done "Under Color of Law" not only when officials acts within the bounds or limits of his lawful authority but also when such officials acts without and beyond the bounds of his lawful authority. In order for unlawful acts of an official to be done Under Color of any Law, however, the unlawful act must be done while the official is purporting or pretending to act in the performance of his official duties, that is to say the unlawful acts must consist in the abuse or misuse of power which is possessed by the Official only because he is an Official and the unlawful acts must be of such a nature, and be committed under such circumstances that they would not have occur but for the fact the person committing them was an official purporting or exercise his official powers. As you will note, the Federal Statute, 42 USCS 1983 covers not only acts done by officials under color of any state law, but also acts done by an official under color of any ordinance or regulations of any state law.

4. Statute 92.06 "Knowingly" to act an act is done knowingly if done voluntarily and intentionally, and not because of mistake, of accident, or other incorrect reasons.

5. 18 USCA Statute 871
Gun Threat
Intent to injury – Violations of Civil Rights.

6. 18 USCA s 1514 (c) (1)
Federal Statute provides for a Civil Action to Restrain Harassment of

of Victims or witness in a course of conduct that cause substantial emotional distress, fear as served no legitimate purpose.

7. 6th Amendment of the Constitution of the United States of America. (also FRCP – 38b)
For Jury Trial.

8. FRCP 19 (a)
Joiner of persons needed for just adjudication. The subject matter Sexual Abuse, Gun Threat on Life, and Harris Children, in the property of this suit. FRCP 19(a) joiner of persons needed for just adjudication. The judgment of the court that the Subject matter of title by judgment. The Subject Matter, Sexual Abuse, Gun Threat on life and Harris Children, Legal Evidence on the factual issues is the property of this suit.

9. FRCP 20 – Joiner of Parties.
All persons may join in one action.

10. PL 135 Authorizes the reassignment of non-Indian Employees of the Bureau of Indian Affairs to other locations upon a finding by Assistant Secretary of a valid Health and Safety reason.

## STATEMENT OF CASE

June 1994 Pro Se filed Discrimination in FTCA in Oklahoma Eastern Court.

On August 1994, Plaintiffs voluntary dismissed Discrimination and all FTCA claims in the Action against the Government, rendering it non-existent within the Court Files and no Court would have jurisdiction.

Plaintiffs had abandoned any claims made under the Federal Tort Claims Act or E.E.O. Statutes.

On August 1994, Plaintiffs filed Civil Rights Violations in reliance upon 14th Amendment and Statues of the Constitution of the United States of America. Plaintiffs commenced this Pro Se Action in The District Court for The Eastern District Court of Oklahoma.

Plaintiffs Pleading sought relief for Civil Rights Violations of Gun Threat on Life and Sexual Abuse on Plaintiffs Children, six and eight years of age in Government housing on a Government Compound and Greasewood Boarding School Campus, B.I.A.

Plaintiffs Pleading sought money relief for suffering, damages of mental upset, physical damages, fear, humiliation, loss of Profession, and income in the amount of five million dollars.
(42 USC)

Plaintiffs, Government Employees, Teaching at a Government Boarding School, living in Government Housing on a Government Compound requested reassignment due to Health and Safety reasons. Superintendent acting above and beyond his official duty declined the transfer placing Plaintiffs in danger of Health and Safety. (APP-I)

December 1994, Oklahoma District Court in their order, stated Discrimination and all FTCA Claims Voluntary requested by Plaintiffs, be dismissed. The Plaintiffs suit, Civil Rights will proceed in Court. (APP-H)

Scheduling Order Filed November 14, 1994, had been completed through March, 1995. (APP-D)

Trial Date, Jury Trial, set for May, 1995

On March 1995, Oklahoma District Court granted Defendants Motion, Transfer of Venue to the District of Arizona. (APP-F)

On March 1995, Plaintiffs filed motion for Hearing on Transferring of Venue.

Plaintiffs request for hearing to present Change of Venue and Forum Convenience. Facts which by state Constitutes an exception to general rights to be sued in the court of his residents. Facts to be heard and established at hearing on Plea of Privilege was denied.

In May 1996, Plaintiffs filed Petition for 10th Circuit Court in respond to Transferring of Venue.

10th Circuit Court respond they never received the Petition on Transferring Venue.

Nine months later Arizona District Court states the Petition was mailed to them and was filed in Ninth Circuit Court.

Arizona District Court, in the Abuse of Discretion obstructed Due Process of Law. FRCP, Petitions will be filed in The Appellant Court of district where order is given.

Order of January 19, 1996, Arizona District Court entered an Order granting Partial Summary Judgment to Defendants as to all Title VII Claims presented by Plaintiffs. Discrimination, Race / Reprisal. (App F)

This suit in 1994 was voluntary dismissed by Plaintiffs rendering it non-existent within the court files and no court would have jurisdiction

Furthermore, Plaintiffs had abandoned any claims made under the FTCA or the E.E.O. Statutes.

The Arizona District Court in this same Order dismissed Plaintiffs Pleading on Civil Rights Violations together with all additions and attachments thereto.

Plaintiffs set forth specific facts with evidence there is a genuine issue for trial. This evidence, Doctor Reports, Police Reports, Confessions of offenders, Depositions and Documentation support issues there is genuine issue of material facts that a jury could return a verdict.

Order January 1996, Arizona District Court, ordered Plaintiffs to file Second Complaint setting forth what the Plaintiffs referred to as "Their Civil Rights, Gun Threat on Life, Sexual Abuse and Government decline relocation due to Health and Safety reasons. (App-E)

This Second Complaint must not incorporate any portion of any prior pleading and Harris Children are not Plaintiffs and cannot be referred to or represented.

Plaintiffs are not representing Harris Children. They are victims and included in evidence and subject matter and cannot be separated from case.

Plaintiffs could not write Second Complaint as Arizona District Court had dismissed evidence and subject matter of case. There were no new allegations.

Therefore with Arizona District Order, subject of Case, a second complaint would have constituted a non-frivolous basis for cause of action.

March 28, 1997, Arizona District Court dismissed and entered judgment on behalf of the Defendants. (App-C)

On April 11, 1997, Plaintiffs filed on Appeal from a Judgment of The United States District Court for the District of Arizona.

The District Court did not have jurisdiction. Case Discrimination, FTCA Claims were voluntary dismissed by Plaintiffs on August 1994, rendering non-extent in Court files and no Court has jurisdiction.

Plaintiffs request Oral Argument, stating reasons argument should be heard in this suit. First Reason: Case Discrimination / FCTA Claims was non-existing Case and no Court has jurisdiction. Second Reason: Arizona District Court ruled for Second complaint on what the Court stated "Plaintiffs so called Civil Rights Violations.

Nineth Circuit Court denied Oral Argument.
(App-B)

On August 27, 1997 Arizona District Court Defendants Attorney did not follow FRCP. He was late filing motion for permission to late file Appellees' Brief. The Schedule stated August 27th and he request late filing on August 29th. (App-G)

The Court of Appeals for the Nineth Circuit Court granted this motion.

On September 17, 1998 The United States Court of Appeals for the Nineth Circuit Court affirmed the District Court dismissal of this action. (App-A)

Nineth Circuit Court Reasons:

1. Plaintiffs failed to state a reason upon which relief could be granted and failed to comply to Courts prior order on Second Complaint.

The Second Complaint was never written as District Court rules non existing Subject Matter and Evidence from Case.

The Nineth Circuit Court stated Plaintiffs filed under 43 U.S.C.S. and 14th Amendment, Civil Rights Violations and the District Court Admonished the Appellants on two occasions that these claims were non applicable. (App-A)

The Appellants were admonished on one occasion from Arizon District Court and told to file under VII and FTCA – Appellants declined.

On second occasion Appellants were admonished and told to file under Fifth Amendment of Constitution. Appellants declined. This is not the Criminal Aspect of the Case but the Civil Aspect.

The Appellants jobs as teachers is a property interest which is protected by due process of law, 14th Amendment of Constitution of the United States.

42 USC Section 1983 in pertinent part any Citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution any laws, shall be liable to the party injured in an action at law for redress.

Nineth Circuit Court states, there is no constitutional right to be protected from acts of other private individuals. (App-A)

This case involved only Government Actors.

In the light of Nineth Circuit Court dispositive findings, Van Ort V. Stanewich: L.W. V. Grubbs, therefore affirm the Districts Court's dismissal of the action.

The Nineth Circuit Court committed a clear error of judgment in the conclusion it reached upon weighing of the relevant factors.

This case, Sexual Abuse, Gun Threat on Life and Government placing Plaintiffs in danger of health and safety reasons when they declined to relocate Plaintiffs.

The Ninth Circuit Court errored in affirming Summary Judgment on Discrimination / FTAC when this was voluntary dismissed by Plaintiffs and rendering it non-existing in Court Files and no Court has jurisdiction.

## REASONS FOR GRANTING THE PETITION

The Ninth Circuit Court erred in affirming Arizona District Courts dismissal of Actions based on Summary Judgment of Discrimination of Race / Reprisal, FTCA.

1. This action filed in Eastern District Court of Oklahoma, June 1994. August 1994, Plaintiffs voluntary dismissed all FTCA Claims in this action against the United States, rendering it non-existent within the courts file. December 1994, Honorable Judge Burrage, Oklahoma District Court affirmed this action. Therefore Ninth Circuit Court having committed a clear error of judgment in their conclusion of affirming District Courts Decision of Summary Judgment. When a claim is voluntary dismissed it cannot be tried again in court and no court has jurisdiction. (App-H)

Arizona District Court inserted this action, FTCA Claims into Plaintiffs, Pro Se, Claims of Civil Rights Violations, Sexual Abuse, Gun Threat on life, and Government placed Plaintiffs in danger of health and safety when they declined to relocate Plaintiffs. Arizona District Court gave Summary Judgment.

Further the District Court dismissed Plaintiffs Complaint, Civil Rights Violations, together with all pleadings and attachments thereto. However District Court noted that Plaintiffs had abandoned any claim made under the FTCA and the possible constitution rights to the District Court ordered a Second Complaint. It could not refer to any Prior Pleadings, could not incorporate any incidents referred to and could not refer to Harris Children. District Court violated Due Process of Law. The Statue of the Constitution of the United States of America. The Subject matter necessary for a Case cannot be separated from Case.

2. WHETHER THERE WAS AN ABUSE OF DISCRETION BY NINTH CIRCUIT COURT DECLINE TO ADDRESS HARRIS CHILDREN, GUN THREAT ON LIFE AND SEXUAL ABUSE?

Appellants Supplemental Excerpts of Records mailed to Ninth Circuit Court included Sexual Abuse, Gun Threat on Life and Harris Children.

Plaintiffs had set forth specific facts with evidence there is a genuine issue for trial. This evidence supports issue of material facts that a Jury could return a verdict. The subject of this action filed in District Court is the

Sexual Abuse, Gun Threat on Life and Harris Children and is necessary and cannot be separated from suit.

3. WHETHER NINTH CIRCUIT COURT ERRED IN AFFIRMING ARIZONA DISTRICT COURT DECISION BASED ON PRIVATE GOVERNMENT INDIVIDUALS PROTECTION BY GOVERNMENT WHEN SUIT CONSIST OF GOVERNMENT EMPLOYEE ACTORS ONLY?

The Ninth Circuit Court using DeShaney V Winnebago County Department of Social Services stated "in General there is no Constitutional right to be protected from the acts of other private individuals."

Plaintiffs lived in Government Quarters on Government Compound and Teachers at a Government Boarding School filed suit against Government and only Bureau of Indian Affairs employee actors are involved in this action.

4. WHETHER NINTH CIRCUIT COURT ERRED IN RULE FOR DISTRICT COURT FOR APPELLANTS FAILURE TO COMPLY WITH DISTRICT COURT ORDER FOR SECOND COMPLAINT?

On January 19, 1996 the District Court dismissed Plaintiffs pleading, amended Complaint, its additions and attachments. The Plaintiffs were ordered to file their Second Complaint setting forth rules.

Plaintiffs could not refer to Prior Pleading, could not incorporate any incidents referred to and could not refer to Harris Children. This Order rendering the Subject of Case non-existing. Finally if the Plaintiffs had filed the Second complaint with the Rules of District's Courts Order it would have Constituted a non-frivolous basis for cause of action.

5. WHETHER THE DISTRICT COURT CORRECTLY DISMISSED PLAINTIFFS PLEADING AND EVIDENCE WITH SUBJECT MATTER OF SEXUAL ABUSE GUN THREAT ON LIFE, HARRIS CHILDREN AND DENIED PLAINTIFFS REQUEST FOR HEARING?

Plaintiffs, Civil Rights Violations, set forth specific facts with evidence there is a genuine issue for trial. This evidence, doctor reports, police reports, confession of offenders, depositions and legal documentation supports issue there is genuine issue of material facts that a jury could return a

verdict. Therefore the Subject Matter of Case set forth in Pleading Sexual Abuse, Gun Threat on Life of Plaintiffs Children. Plaintiffs request for relocation due to Health and Safety Reasons. PL. 135. (App-I)

District Court nor Ninth Circuit Court addressed P.L. 135.
P.L. 135 covers three criteria of the law established in 44 BIAM 335, Safety and Health Reducti.ion-in-Force, working relations with a Tribe. The Secretary, the Undersecretary, and the Assistant Secretary are the three individuals who are authorized by law to approve reassignment.

The provisions of 135 on health and safety reassignments for Non-Indian were included in 44 BIAM 335, but not included in 62 BIAM for Contract Employees, which violates one's rights, produces a Policy Gap.

If paper work is presented by Administration, local area, to Personnel Management, Washington D. C., they submit it over to the Assistance Secretary for approval. This method had worked as Secretary still has Authority to relocate. They stated they had never had any denials except Administration, Local Lever, never presented any paper work for Plaintiffs.

6. WHETHER OKLAHOMA DISTRICT COURT CORRECTLY ORDER TRANSFERRING VENUE?

Accordingly Plaintiffs requested this Action not be transferred to the District of Arizona due to Health Reasons, Hardship and Oklahoma is as convenient as Arizona.

All Records of investigation by Police, Principal, B.I.A. Greasewood, Investigation by Maurice W. Babby, Teton Associates, Littleton, Colorado on behalf of the United States Department of Interior are filed in Washington DC. F.B.I. records are held in Washington D.C. Also Plaintiffs and District Court holds copies.

All of the witness include two from Arizona, two from New Mexico, three from Washington D.C. and four from Oklahoma.

Health Reason: The six year old daughter of Plaintiffs was badly Sexual Abused through rectum and was suffering from Prolapse of rectum. This child was also a Cystic Fibrosis child and was placed in Cystic Fibrosis Center, Oklahoma for treatment. She was to remain in 100 mile radius of hospital for emergency reasons.

The son of Plaintiffs, 8 years of age was Sexual Abused through rectum, a Gun held to his head and told they were going to kill him, was suffering from mental upset, physical damage, fear, and humiliation.

Therefore we established residents at Ada, Oklahoma and therefore filed Civil Suit in Eastern District Court, Muskogee, Oklahoma.

Plaintiffs requested hearing to present Change of Venue and Forum Convenience - Facts which by State Constitutes an exception to general rights to be sued in the county of his residents. The Facts to be heard and established on Plea of Privilege was denied.

7. WHETHER OKLAHOMA DISTRICT COURT ERRED WHEN THEY REFUSED TO FILE PETITION ON TRANSFERRING VENUE TO TENTH CIRCUIT COURT AND HAILED PETITION TO ARIZONA DISTRICT COURT?

Plaintiffs Petition to Tenth Circuit Court, Transferring Venue was excepted, stamped filed, and a $120.00 fee paid. This petition was not filed with Tenth Circuit Court, but mailed to Arizona District Court. Nine months later Arizona District Court state it was filed with Ninth Circuit Court.

Arizona District Court, Knowingly that an order given in a District Court must be filed in the Circuit Court of that District. Arizona District Court violated FRCP.

## CONCLUSION

The erroneous application of legal principles and laws by Arizona District Court resulted in denial of Due Process of Law.

Ninth Circuit erred in affirming District Courts Summary Judgment and Failure to comply with Court Order of Second Complaint.

Reasons: Plaintiffs Voluntary dismissed Discrimination, FTCA, and this was exited from Court Records and no court has Jurisdiction.

Second Reason: Arizona District Court Order with rules separate Subject from Suit.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Mary Warr / Dale Harris

Date: 12/5/98

# APPENDIX-A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DALE K. HARRIS and
MARY VAN,

Plaintiffs Appellants,

vs.

DEPARTMENT OF THE INTERIOR;
BRUCE BABBITT,
Secretary of the Department of Interior;
CHARLES JOHNSON;
MICHAELSHOENFELD;
DUKE STEPHENSON;
CATHY BEGAY;
WILLIAM MEHOJAH;
DONALD NECONIE;
UNITED STATES OF AMERICA
Defendents - Appellants

No. 97-15660
D.C. NO. CV 95-00481-PGR
Filed Sep. 17, 1998

MEMORANDUM *

Appeal from the United States District Court
for the District of Arizona
Paul G. Rosenblatt, District Judge, Presiding

Submitted September 14, 1998 **

Before: O'SCANNLAIN, FERNANDEZ and TASHIMA, Circuit Judges

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision on the briefs and without oral argument pursuant to Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4. Accordingly, the request for oral argument is denied.

Dale Harris and Mary Van, formerly employed as contract teachers at the Greasewood Boarding School operated by the United States Department of the Interior on the Navajo Reservation, appeal the district court's dismissal of their claims. Harris and Van allege constitutional violations based on the government's alleged failure to transfer them to a different district or otherwise to protect them from abuse and harassment they suffered from other private individuals.

The district court granted the government's motion on two grounds. First, under Federal Rule of Civil Procedure 12(b) (6), the court found that Appellants' Second Amended Complaint ("Complaint") failed to state a cause of action upon which relief could be granted. And second, under Federal Rule of Civil Procedure 41(b), the court held that the Complaint failed to comply with the court's prior orders. We review the district court's grant of summary judgement de novo. See Barnett v. Centoni, 31 F.3d 813, 815 (9th Cir. 1994)

Appellants claim in their pleadings and in their brief on appeal that the government violated their civil rights under 42 U.S.C § 1983 and the 14th Amendment. The district court admonished the Appellants on two occasions that these claims were not applicable to the Federal government or its officers The district court was correct, and the Appellants have not, therefore, stated a claim upon which relief can be granted.

Even if we give Appellants the benefit of the doubt and assume they had alleged violations under the Fifth Amendment Due Process Clause instead of the Fourteenth Amendment, Appellants still fail to plead a prima facie case. Their pleadings and briefs are very confused and almost incomprehensible. We have gleaned that Appellants' central allegation is based on the government's failure to protect them from private individuals' abusive and threatening behavior that took place on a government compound.[1] In their Complaint, Appellants allege that the government violated their civil rights because it "failed to take appropriate action when the lives, health, and safety of Plaintiffs and Plaintiff's family were threatened."

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[1] Appellants make other unsubstantiated allegations that are not cognizable as constitutional or civil rights claims, which, the Appellants repeatedly insist, are the only type of claim they are alleging. In addition, some of these allegations are included in Appellants' brief on appeal but not in the Complaint.

In general, there is no constitutional right to be protected from the acts of other private individuals See DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 196-197 (1988). "Only under highly limited circumstances does the government have a duty to protect individuals from deprivations of constitutional rights by private individuals. Van Ort v. Stanewich, 92 F.3d 831, 836 (9th Cir. 1996), cert. denied, 117 S. Ct. 950 (1997) . These limited circumstances are divided into two categories: "(1) the special relationship exception; and (2) the danger creation exception." L.W. v. Grubbs, 974 F.2d 119, 121 (9th Cir. 1992) (internal citations and quotations omitted), cert. denied, 113 S. Ct. 2442 (1993). The first category is reserved for custody and involuntary hospitalization. The second category requires "affirmative conduct on the part of the state in placing the plaintiff in danger." Id. (emphasis added). Because the government's failure to protect Appellants on a federally operated school campus was neither custody nor affirmative conduct, it does not fit into these two limited exceptions. We, therefore, affirm the district court's dismissal of the action.

In light of the dispositive findings above, we need not review the district court's alternative grounds to dismiss under Rule 41(b) for Appellants' failure to comply with court orders. Because the complaints rely on the same set of facts and pleadings, we also decline to address Appellants' allegation that the district court erred in dismissing their complaints on behalf of their children.

AFFIRMED.

# APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DALE K. HARRIS and
MARY VAN,

Plaintiffs - Appellants,

v.

DEPARTMENT OF THE INTERIOR;
BRUCE BABBITT,
Secretary of the Department of the Interior;
CHARLES WAYNE JOHNSON;
MICHAEL SHOENFELD;
DUKE STEPHENSON;
CATHY BEGAY;
WILLIAM MEHOJAH;
DONALD NECONIE;
UNITED STATES OF AMERICA

Defendants - Appellees.

No. 97-15660

D.C. NO. CV 95-481-PGR
Filed Oct 15, 1998

**ORDER**

Before: O'SCANNLAIN, FERNANDEZ, TASHIMA, Circuit Judges.

Treating appellants' petition for review of material facts and laws overlooked in the decision as a petition for rehearing, the petition for rehearing is denied.

# APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

| | | |
|---|---|---|
| DALE K. HARRIS, et al., | ) | No. CIV 95-0481 PHX PGR |
| | ) | Filed March 28, 1997 |
| Plaintiffs, | ) | |
| vs. | ) | |
| | ) | **ORDER** |
| UNITED STATES OF AMERICA, et al., | ) | |
| | ) | |
| Defendants. | ) | |

On January 19, 1996, the Court entered an order (doc. #176) that in part dismissed the plaintiffs' amended complaint and all additions thereto and ordered the plaintiffs to file a second amended complaint setting forth their constitutional tort/civil rights claims; the order set forth pleading requirements for the second amended complaint. On July 23, 1996, the Court entered a second order (doc. #192) that granted the plaintiffs an extension of time to file the required second amended complaint and required that the second amended complaint comply with the Court's directions regarding contents and format; in an effort to help the plaintiff's understand what was

[1]The Court's January 19th order stated in part:

Since the Court is perplexed as to exactly what claims the plaintiffs are attempting to allege, the Court will require them to file a second amended complaint that sets forth their constitutional tort claims in detail sufficient to apprise the defendants and the Court of the legal and factual bases of those claims. The plaintiffs are advised that this will be in all likelihood their last chance to file an amended complaint and that this action will be subject to dismissal without leave to amend if the second amended complaint fails to state a proper claim. The plaintiffs are further advised that under Fed.R.Civ.P. 11(b) they have the obligation to undertake a reasonable pre-filing inquiry to ensure that all claims alleged in the second amended complaint have a legal and factual basis. The second amended complaint must consist of one document, must comply with Fed.R.Civ.P. 8(a) and 10 and Local Rule 1.9, must not incorporate by reference any portion of any prior pleading, must allege separate claims in separate counts, must distinguish among the defendants if not all claims pertain to all defendants, and must distinguish between the plaintiffs if not all claims pertain to both plaintiffs. The plaintiffs are also advised that it is their obligation to be familiar with, and abide by, this Court's published Local Rules. (Footnote omitted).

desired, the order further instructed the plaintiffs as to the pleading requirements for the second amended complaint.[2] The plaintiffs filed a Second Amended Complaint on August 7, 1996 (doc. #193) that in no way complies with the Court's orders, even if the plaintiff's Brief in Support of Second Amended Complaint (doc. #194) is construed to be part of the Second Amended Complaint.

Pending before the Court is the United States' Motion to Strike Second Amended Complaint; Motion to Dismiss; Motion to Reurge Prior Motion to Dismiss (doc. #195). Having considered the parties' memoranda, the Court finds that this action should be dismissed pursuant to Fed.R.Civ.P. 41(b) for failure to obey the Court's previous orders, McHenrvv. Renne, 84 F.3d 1172 (9th Cir. 1996), and pursuant to Fed.R.Civ.P. 12(b)(6) for failure of the Second Amended Complaint to state any type of cognizable constitutional tort or civil rights claim, which the plaintiffs insist is the only type of claim that they are still alleging. Therefore,

IT IS ORDERED that the United States' Motion to Strike Second Amended Complaint (doc. #195-1) is denied.

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[2]The Court's July 23rd order stated in part:

The January 19th order also attempted to explain, obviously unsuccessfully given the statements in the plaintiffs' subsequent memoranda, that the plaintiffs' "civil rights' claims, if any, could only be claims for constitutional torts under Bivens. The Court understands that the plaintiffs' position is that they are not bringing any employment discrimination–related claims or tort claims under the Federal Tort Claims Act. The Court's reference to "constitutional torts" is not a reference to employment discrimination or FTCA tort claims, but is used in an attempt to give some direction to the plaintiffs – their repeated assertions that they are suing for "civil rights violations" are meaningless since "civil rights is simply too amorphous a term in a legal sense to give the Court and defendants any understanding of the legal basis for the claims the plaintiffs are bringing. For that reason, each claim the plaintiffs allege in their second amended complaint must set forth a specific legal basis for it. The plaintiffs are again advised that the Fourteenth Amendment, which applies only to actions taken by states and state employees, is not at issue in this case inasmuch as it is the Fifth Amendment, not the Fourteenth Amendment, that applies to actions of the federal government and federal employees.

IT IS FURTHER ORDERED that the United States' Motion to Dismiss (doc. # 195-2) and Motion to Reurge Prior Motion to Dismiss (doc. #195-3) are both granted to the extent that this action is dismissed in its entirety pursuant to Fed.R.Civ.P. 12(b)(6). The Clerk of the Court shall enter judgment accordingly.

Dated this 28th day of March, 1997.

/s/ PAUL G. ROSENBLATT
Paul G. Rosenblatt
United States District Judge